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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

RUSSELL CARBONE,
Petitioner,

– against –

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Can a conviction of a criminal defense lawyer for subornation of perjury and obstruction of justice be upheld upon a claim that the lawyer elicited testimony he "apprehended" was false without proof that he had actual knowledge, in a strict sense, that the testimony was false.

2. Is a bad act or crime relevant to the defendant's intent whenever it is similar to the offense for which the defendant is on trial so that, on the basis of similarity alone, it meets the relevancy requirement for admissibility under Fed. R. Evid. 404(b) in any case in which intent is an element of the offense on trial.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is unpublished, and is set forth in the Appendix at App. 1.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals for the Eleventh Circuit was entered on May 16, 2002. (App. 1) A petition for rehearing en banc was denied by order entered on July 18, 2002. (App. 14) This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Rule I(A) of the Local Rules of the United States District Court for the Southern District of Florida, Rules Governing Attorney Discipline, provides:

> Acts and omissions by an attorney admitted to practice before this Court, individually or in concert with any other person or persons, which violate the Rules of Professional Conduct, Chapter 4 of the Rules Regulating The Florida Bar shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney/client relationship. Attorneys practicing

> before this Court shall be governed by this Court's Local Rules, by the Rules of Professional Conduct, as amended from time to time, and, to the extent not inconsistent with the preceding, the American Bar Association Model Rules of Professional Conduct, except as otherwise provided by specific Rule of this Court.

Rule 4-3.3(a) of the Rules Regulating the Florida Bar, provides:

> False Evidence. Duty to Disclose.
>
> A lawyer shall not knowingly:
>
> (4) permit any witness, including a criminal defendant, to offer testimony or other evidence that the lawyer knows to be false. A lawyer may not offer testimony that the lawyer knows to be false in the form of a narrative unless so ordered by the tribunal. If a lawyer has offered material evidence and thereafter comes to know of its falsity, the lawyer shall take reasonable remedial measures.

Rule 4-3.3(c) of the Rules Regulating the Florida Bar provides:

> Evidence Believed to Be False. A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

Rule 3.3(a) of the ABA Model Rules of Professional Conduct provides:

> A lawyer shall not knowingly:
>
> (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence

> and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

Rule 3.3(c) of the ABA Model Rules of Professional Conduct provides:

> A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

Rule 404(b) of the Federal Rules of Evidence provides:

> **(b) Other Crimes, Wrongs, or Acts.** – Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

STATEMENT OF THE CASE

Petitioner Russell Carbone is a criminal defense attorney who was accused of suborning perjury by Libia Porras at the trial of Porras's sister, Olga Agudelo, on federal heroin trafficking charges. Russell Carbone represented Agudelo, who pled not guilty and exercised her right to go to trial in the United States

District Court for the Southern District of Florida.

At Agudelo's trial, Carbone called Porras as a witness in her sister's defense. Porras' testimony provided Agudelo with an alibi and an explanation as to why the government's witnesses would testify falsely against Agudelo. Notwithstanding Porras' exculpatory testimony – which Porras later admitted was not truthful – the jury convicted Agudelo. Shortly after the guilty verdict, having herself been caught in a lie to the Probation Officer preparing her pre-sentence report, Agudelo told the Probation Officer that Porras was not her sister (though in fact she was) and that Porras had perjured herself at Agudelo's trial on instructions from Agudelo's lawyer, Petitioner Carbone. When Porras reentered the United States a year later, she was arrested on perjury charges. Porras told the authorities that Petitioner directed her to testify perjuriously and that Petitioner had himself contrived the false story Porras told from the stand.

Carbone was indicted on charges of conspiracy to obstruct justice and to commit perjury, in violation of 18 U.S.C.

§ 371; subornation of perjury, in violation of 18 U.S.C. § 1622; obstruction of justice, in violation of 18 U.S.C. § 1503; and false declarations before a court (perjury), in violation of 18 U.S.C. § 1623.

The government's case against Petitioner rested on the testimony of Agudelo (Petitioner's former client); Porras (the admitted perjurer); and Veronica Caicedo (their niece). Porras and Caicedo testified at Petitioner's trial that Porras' false testimony was concocted by Carbone and foisted upon Porras at a meeting held the night before Porras took the stand. Agudelo testified that, although she knew Porras would testify on her behalf, she did not know what testimony Porras would give, and that the false testimony Porras gave at Agudelo's trial was presented without Agudelo's prior knowledge and to her surprise.

On its face, the Agudelo-Porras-Caicedo story was extraordinarily farfetched. It rested on the notion that an American lawyer, with no previous relationship with his Colombian client, would concoct and implement a plan to

present perjurious testimony to exculpate the client, without the client's knowledge, consent, or participation. Moreover, its baselessness was demonstrated at Petitioner's trial, for it was flatly contradicted by uncontroverted documentary evidence in the form of a certified transcript of Agudelo's trial, which established a timeline that showed that the events about which the women testified could not possibly have happened. That transcript showed that the Petitioner had cross-examined a government witness with information that, according to the government's witnesses, Petitioner did not receive until he met with Porras and Caicedo later that day, after the cross-examination had already occurred.

The prosecution's claim that Carbone had fabricated false testimony which he fed to the witness was further undermined by documentary proof that Agudelo concocted an alibi for herself about which Porras testified, and a phony passport stamp to support that alibi, long before Agudelo or Porras ever met Carbone. In addition, the defense showed that the three closely-related women had strong motives to lie about how Porras' false

testimony came to be given, and had ample opportunity to craft a story that shifted the blame from them and placed it on the American lawyer. Furthermore, while their stories were superficially consistent, they were inconsistent and contradictory in important respects.

Appreciating the weakness of its case, before trial, the prosecutor sent out a broad e-mail query actively soliciting complaints from state and federal prosecutors who may have had dealings with Petitioner. One former Assistant United States Attorney, Hui Chen, responded, claiming Carbone had betrayed the trust she had reposed in him and misled a federal magistrate in connection with an unrelated bail matter Petitioner had handled in New York, a case in which Ms. Chen represented the government. Over defense objection, the trial court permitted testimony on the subject of this unrelated bail matter, under Rule 404(b) of the Federal Rules of Evidence, though the trial judge later repeatedly expressed her misgivings about the propriety of

her ruling, indicating that she had been misled about what the 404(b) evidence would be and that she had "made or may have made a big mistake" in admitting the proof. (R18:111)

The jury convicted Carbone on all charges. Under the Sentencing Guidelines, and primarily because the proceeding in which Porras' false testimony was given was a serious narcotics trafficking prosecution, Carbone's offense level was 32. He has been sentenced to a prison term of 120 months, but remains at present free on bail.

On appeal to the Eleventh Circuit, Petitioner Carbone argued that, even though Agudelo, Porras, and Caicedo each testified that he had concocted the perjurious story Porras swore to on the stand at her sister's trial, the government's evidence was "inherently incredible" – "incredible as a matter of law" – and thus legally insufficient to support the convictions under Eleventh Circuit precedents, specifically United States v. Chancey, 715 F.2d 543 (11th Cir. 1983); United States v. Calderon, 127 F.3d 1314, 1325 (11th Cir. 1997), cert. denied, 523

U.S. 1033 (1998); and United States v. Rivera, 775 F.2d 1559, 1561 (11th Cir. 1985), cert. denied, 474 U.S. 1051 (1986).

Significantly, in its Answering Brief to the Court of Appeals, the government conceded the possibility that its witnesses had lied about Carbone having concocted and fed Porras a false story, which he caused Porras to testify to Agudelo's surprise, and over Porras' protests that she would be perjuring herself if she so testified. The government argued on appeal that Petitioner's conviction was nevertheless valid because, even if Petitioner had not invented Porras' testimony, the evidence was sufficient to support the conclusion that "Carbone elicited [Porras' testimony] while knowing it to be false." Government's Brief at 25. Though the theory had never been presented in the trial court, the government argued that "the essential issue was simply whether Carbone apprehended the falsity of the testimony" when he "coaxed it" from Porras even if the jury concluded that "Porras, Caicedo and Agudelo [and not Petitioner] were the authors of the tale." Id.

Petitioner argued in reply that the conviction could not be affirmed on a factual theory different from the one on which the prosecution had been based, and against which he had had no opportunity to defend.

In addition, he argued that the government's newly articulated theory of guilt was as flawed as the theory it had actually presented at Petitioner's trial. Absent proof that he actually knew, in a very strict sense, that Porras' testimony was false when he elicited it, a lawyer who elicits false testimony from a witness cannot be convicted of suborning perjury and obstructing justice even if it might be said, in retrospect, based upon all of the circumstances, that he "apprehended" that the testimony he educed was false.

On appeal he also argued that the admission of the Rule 404(b) evidence was reversible error because it was not relevant to the issue of defendant's mens rea, that is, to whether he actually knew Porras' testimony was perjurious. Whether or not

Carbone had misled a court or prosecutor in an unrelated bail matter for a different client in a different court was forbidden propensity evidence, plain and simple.

Notwithstanding the importance of the issues in this case to the entire defense bar, the Eleventh Circuit affirmed Petitioner's conviction in an unpublished opinion. It disposed of his sufficiency-of-the-evidence claims in a footnote, "affirm[ing] this issue without discussion pursuant to 11th Cir. R. 36-1." (App. 2)

It wrote on the Rule 404(b) issue, holding that a bad act of the defendant is relevant on the issue of defendant's intent, in any prosecution in which intent is in issue, as long as the bad act is "sufficiently similar" to the offense for which the defendant is on trial. (App. 7-8)

Defendant's petition for rehearing en banc was denied. (App. 14-15) Petitioner's motion to stay issuance of the mandate pending an application to this Court for certiorari was granted by order dated August 9, 2002.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS INVOLVES A QUESTION OF EXCEPTIONAL IMPORTANCE TO THE DEFENSE BAR AND TO THE CRIMINAL JUSTICE SYSTEM AS A WHOLE

The per curiam, unpublished decision of the Eleventh Circuit involves a question of exceptional importance to the defense bar and to the criminal justice system as a whole. In rejecting, without discussion, Petitioner's contention that the evidence was legally insufficient to support his conviction, it approved the conviction of a defense attorney based either on testimony that was shown to be inherently incredibly (and which the government no longer stands behind) or on a theory not presented at trial but first advanced by the government on appeal: that a defense attorney is guilty of suborning perjury whenever he elicits testimony whose falsity he "apprehended."

If that is the law, it is a substantial departure from the ethical principles which have been widely understood to apply. If permitted to stand, it will work a major shift in the relationship between defense attorneys and their clients. Ultimately, it will

interfere with the effective assistance of counsel which the Sixth Amendment vouchsafes all criminal defendants, and it will undermine the proper functioning of the criminal justice system.

It is well settled that an attorney cannot properly present testimony or evidence that he "knows" is false. Petitioner was subject to that Rule. Rule 3.3(a)(4) of the ABA Model Rules of Professional Conduct, which applied to lawyers, like Petitioner, practicing in the United States District Court for the Southern District of Florida, provides that "A lawyer shall not knowingly ... offer evidence that the lawyer knows to be false." See generally Nix v. Whiteside, 475 U.S. 157, 166-68 (1986) (discussing Model Code of Professional Responsibility and Model Rules of Professional Conduct).

But a corollary of that rule is an insistence on a stringent standard of "knowing." See Monroe H. Freedman, "But Only If You 'Know,'" in Ethical Problems Facing the Criminal Defense Lawyer: Practical Answers to Tough Questions (Rodney J. Uphoff, ed. 1995). See also Edward L. Kimball, When Does A Lawyer "Know" Her Client Will Commit Perjury, 2 Geo. J.

Legal Ethics 579 (1988); Carol T. Rieger, Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues, 70 Minn. L. Rev. 121 (1985); Charles Wolfram, Client Perjury, 50 S. Cal. L. Rev. 809 (1977).

The issue of the standard of knowledge which must be met before a lawyer is foreclosed from presenting questionable testimony or is obligated to take steps to prevent the introduction of false testimony has generally arisen in the context of claims by a defendant that his lawyer did not provide effective assistance of counsel. That was how the issue arose in Nix v. Whiteside, supra. There, the majority, rejecting an ineffective assistance claim and upholding the propriety of a lawyer's response to the potential for client perjury, noted that the case involved a situation not likely to arise frequently, "an intent to commit perjury, communicated to counsel," an "announced intention" to commit the crime. Nix, supra, 475 U.S. at 163, 167. Justice Blackmun, concurring, noted that "[e]xcept in the rarest of cases, attorneys who adopt 'the role of the judge or jury to determine the facts,' pose a danger of depriving their clients

of the zealous and loyal advocacy required by the Sixth Amendment." Id. at 189, citing United States ex rel. Wilcox v. Johnson, 555 F.2d 115, 122 (3d Cir. 1977).

Justice Stevens elaborated eloquently on a related theme:

> Justice Holmes taught us that a word is but the skin of a living thought. A 'fact' may also have a life of its own. From the perspective of an appellate judge, after a case has been tried and the evidence has been sifted by another judge, a particular fact may be as clear and certain as a piece of crystal or a small diamond. A trial lawyer, however, must often deal with mixtures of sand and clay. Even a pebble that seems clear enough at first glance may take on a different hue in a handful of gravel.

Id. at 190.

These principles – including a sensitivity to the ambiguous circumstance in which lawyers practice and to the defense attorney's role in the criminal justice system as an advocate for his client, not as a factfinder – are reflected in the decisional law.

However, neither the federal nor the state decisions are fully consistent with respect to a lawyer's ethical obligations or a defendant's Sixth Amendment right to effective assistance of

counsel. In United States ex rel. Wilcox v. Johnson, supra, the Third Circuit held that a lawyer is forbidden to act on the belief that his client is committing perjury unless he has a "firm factual basis" for that conclusion. 555 F.2d at 122. See also Commonwealth v. Mitchell, 2000 WL 33119695 (Mass. Super. 2000) (adopting firm factual basis standard); State v. James, 739 P.2d 1161, 1169 (Wash. Ct. App. 1987) ("firm basis").

In explaining what constitutes a firm factual basis, the courts generally have set an extremely high standard. The Eighth Circuit has insisted upon a direct admission of perjury by the witness to establish a firm factual basis. United States v. Long, 857 F.2d 436, 445 (8th Cir. 1988), cert. denied, 502 U.S. 828 (1991). The Second Circuit has interpreted a firm factual basis to require a "clearly established" or "actual knowledge" standard based upon an admission by the client. Doe v. Federal Grievance Committee, 847 F.2d 57 (2d Cir. 1988) (explaining why high standard of knowledge is required). Some courts require counsel to engage in an independent investigation of the facts before determining that anticipated testimony will

constitute perjury. See State v. DeGuzman, 701 P.2d 1287, 1291 (Hawaii 1985); People v. Schultheis, 638 P.2d 8 (Colo. 1981).

The standard of "beyond a reasonable doubt" has also been adopted by courts and commentators. See, e.g., United States v. Del Carpio-Cotrina, 733 F.Supp. 95, 99 (1990); Shockley v. State, 565 A.2d 1373, 1379 (Del. 1989); Com. v. Alderman, 437 A.2d 36, 39 (Pa. Super. 1981) (unnecessary for lawyer to conduct independent investigation of facts where lawyer knew beyond a reasonable doubt certain witness would perjure himself if called to testify and defendant's change of story was implausible); Edward L. Kimball, When Does a Lawyer "Know" Her Client Will Commit Perjury?, 2 Geo. J. Legal Ethics 579, 581 (1988). Some commentators have gone further, using such phrases as "at least beyond a reasonable doubt," an "undeniable conclusion," and "absolutely no doubt." See Wayne D. Brazil, Unanticipated Client Perjury and the Collision of Rules of Ethics, Evidence and Constitutional Law, 44 Mo. L. Rev. 601, 608-09, 614 (1979); Norman Lefstein, Client Perjury in Criminal Cases: Still in Search of an Answer,

1 Geo. J. Legal Ethics 521, 528 (1988). But see State v. Hischke, 639 N.W.2d 6, 10-11 (Iowa 2002) (rejecting "actual knowledge standard;" lawyer must be "convinced with good cause to believe the defendant's proposed testimony would be deliberately untruthful").

A lawyer is not ethically obliged to present testimony that he believes to be untrue. Rule 3.3(c) of the ABA Rules of Professional Conduct provides that a lawyer "may refuse to offer evidence that the lawyer reasonably believes is false." But the phrasing of Rule 3.3(c) compels the conclusion that a lawyer may present testimony that he believes – but does not "know" to be false.

Given these principles, a clear and strict standard of knowledge must apply before subjecting an attorney to criminal prosecution, conviction, and incarceration for eliciting false testimony from a defendant or a defense witness in a criminal case in which he participated as the defendant's lawyer.

A criminal defense attorney's suspicions or reasonable doubts about the truth of the testimony that his client or a

witness will give cannot be equated with actual knowledge of falsity sufficient to subject the lawyer to criminal sanctions for presenting that testimony in court. Defense attorneys frequently have good reasons or a firm basis to question things their clients or potential defense witnesses tell them; they often have information about the government's case which tells a different story. But it is not the defense attorney's job to determine where the real truth lies. The unrebutted – indeed unchallenged – testimony of ethics expert Professor Charles Wolfram at Petitioner's trial was that a lawyer may present testimony even though he has doubts about its truth. While prosecutors have a special obligation to present only testimony that they believe to be true, defense attorneys have no corresponding obligation. (R13:1594) Professor Wolfram's testimony was in full accord with the rules and standards that governed Petitioner's conduct in the federal District Court in which he tried Agudelo's case.

The Eleventh Circuit did not indicate whether it rejected Petitioner's sufficiency argument because it concluded that the evidence that Petitioner himself invented the false story was not

inherently incredible or on the basis of the significantly different – and constitutionally suspect – theory first presented by the government in connection with the appeal. The government's original theory, based upon its witnesses' claim that Petitioner himself manufactured the story and pressed his client's sister to give it over her insistence that it was false, could theoretically present the very narrow circumstances under which actual knowledge of falsity could exist. However, the evidence at trial showed that claim and the testimony supporting it to be inherently incredible for it was, among other things, shown to be false at its very core by unrebutted documentary timeline evidence. Once the government abandoned that theory on appeal, there was no evidence of actual knowledge sufficient to permit Petitioner's conviction. Yet the panel's decision does not reflect any consciousness of the importance to the criminal justice system and to the defense bar of the questions that this prosecution of a criminal defense attorney raised.[1]

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[1] In outlining the facts of the case, the panel's opinion misdescribes Petitioner's contentions at trial. Petitioner's defense was not that he was "duped into unwittingly eliciting the

By affirming Petitioner's conviction – and the ten-year sentence that goes with it – without providing any reasons why it concluded that the evidence was sufficient to support this conviction, the panel has abdicated a responsibility it owes to the criminal defense bar. It has also undermined the proper functioning of the adversary system which depends on defense attorneys zealously representing their clients. In condoning a manifestly unjust conviction of a particular defense attorney, the Eleventh Circuit has sent a loud signal to the defense bar that when the choice is between representing a client zealously and protecting the lawyer's own skin, the defense attorney will be well advised to choose the latter course. The Eleventh Circuit's

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false testimony" or "unwittingly fooled into presenting the false story to the jury," as the Eleventh Circuit decision states. App. 5, 7. His defense was that all of the credible evidence pointed to the conclusion that Agudelo and her sister together concocted the false story to which Porras testified, neither one of them ever having advised Carbone that the story was false and, instead, representing to him that it was true.

Petitioner was neither a fool nor a dupe; he was an experienced criminal defense attorney. He may well have had doubts or suspicions about the veracity of the Porras-Agudelo version of events.

disposition makes it clear that, if she chooses the former, she can expect no careful consideration and no protection from the courts if and when a dissatisfied client (of which there are many) turns against the lawyer in an effort to improve her own position at the lawyer's expense. Indeed, the Eleventh Circuit's affirmance of Petitioner's conviction can only operate to encourage persons convicted of crimes to do just that. Though the decision of the Eleventh Circuit will not be published, it will not escape the notice of the defense bar or those the defense bar represents.

Certiorari should be granted because defense counsel should not be required to practice their profession with the Sword of Damocles created by the Eleventh Circuit's decision hanging over their heads. Criminal lawyers who serve a crucial function in the administration of justice deserve better. The defendants whom they represent, who are constitutionally guaranteed the effective assistance of counsel, are entitled to more.

II. THE ELEVENTH CIRCUIT HAS GROSSLY MISCONSTRUED RULE 404(b) OF THE FEDERAL RULES OF EVIDENCE BY EQUATING SIMILARITY AND RELEVANCE AND HAS MADE PROPENSITY EVIDENCE ADMISSIBLE AGAINST A DEFENDANT IN VIRTUALLY EVERY FEDERAL CRIMINAL PROSECUTION

Rule 404(b) of the Federal Rules of Evidence provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident [provided notice is given to the defendant in a criminal case or is excused for good cause].

The rule "prohibits the introduction of evidence of extrinsic acts that might adversely reflect on the actor's character, unless that evidence bears upon a relevant issue in the case such as motive, opportunity, or knowledge." Huddleston v. United States, 485 U.S. 681, 685 (1988). The threshold inquiry a court must make before admitting similar acts evidence under Rule 404(b) is whether the evidence is probative of a material issue other than character. Id. at 686.

The Eleventh Circuit, in this case, held that, for Rule 404(b) purposes, a bad act of the defendant is relevant on the issue of the defendant's intent if it is "sufficiently similar" to the offense for which the defendant is on trial. The court defined similarity broadly, further holding that an extrinsic act is "sufficiently similar" if, had the defendant been prosecuted for that act, "the charges would have likely involved elements of offenses similar, if not identical, to those at issue [in the case on trial]." App. 8. See also United States v. Pessefall, 27 F.3d 511 (11th Cir. 1994), cert. denied, 513 U.S. 1174 (1995) (prior offense may be admitted to prove intent if the extrinsic offense requires the same intent as the charged offense).

The unqualified equation of similarity with relevance on the issue of intent is an oversimplified, pernicious and improper reading of Rule 404(b). It eliminates the core and critical question where 404(b) evidence is at issue: whether the act is relevant to defendant's intent on some theory other than propensity. If it is not, then, no matter how similar the extrinsic act is, it does not meet the threshold requirement established by

Rule 404(b) and recognized in Huddleston. The rule announced by the Eleventh Circuit – that any extrinsic act sufficiently similar to the act on trial is "relevant to the charges," opens the door wide to forbidden propensity evidence in all federal criminal prosecutions, since nothing in the Eleventh Circuit's decision operates to cabin the erroneous rule announced.

As the voluminous annotations in the United States Code Annotated show, the government most often seeks to introduce evidence of other bad acts to prove the defendant's "intent." See also J. Weinstein & M. Berger, 2 Weinstein's Evidence, ¶ 404[12] (1996) ("Intent is probably the most frequently employed category for admitting other crimes evidence"). With very few exceptions, "intent," in one sense or another, is an element of every federal offense. And, insuring the broad application of the erroneous rule it announced, the Eleventh Circuit also held, in Petitioner's case, that, intent is an issue – and Rule 404(b) evidence is admissible on that issue – even if the defendant does not contest the issue because the prosecution

retains the burden of proving intent beyond a reasonable doubt. (App. 7)

Twelve years ago, Professor Edward J. Imwinkelried wrote that "[t]he admissibility of uncharged misconduct evidence is the single most important issue in contemporary criminal evidence law," figuring importantly in many of the most celebrated criminal prosecutions of our time. Edward J. Imwinkelried, The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition, 51 Ohio St. L.J. 575 (1990). The statement remains a true one. Certiorari should be granted so that this Court may clarify the law in this area before the unsound and pernicious notion announced by the Eleventh Circuit becomes any more firmly entrenched.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully,

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Of Counsel

Dated: October 9, 2002

APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 01-11055

Filed
U.S. Court of Appeals
Eleventh Circuit
May 16 2002
Thomas K. Kahn
Clerk

D.C. Docket No. 98-00426-CR-UUB

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RUSSELL CARBONE,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(May 16, 2002)

Before BLACK and RONEY, Circuit Judges, and RESTANI*, Judge.

PER CURIAM:

Appellant Russell Carbone, a criminal defense attorney, was charged in a federal indictment with suborning perjury and obstructing justice stemming from his representation of a client in a federal criminal trial in the Southern District of Florida. The indictment charged Appellant and Henry Mejia, Appellant's former assistant, with conspiring to obstruct the due administration of justice and to present false testimony in a court proceeding, in violation of 18 U.S.C. § 371 (count 1), suborning perjury, in violation of 18 U.S.C. § 1622 (count 2), and obstructing justice by presenting false witness testimony, in violation of 18 U.S.C. § 1503 (count 3). Appellant also was charged individually with making false declarations in a court proceeding, in violation of 18 U.S.C. § 1623 (count 4). Following a jury trial, both defendants were found guilty as charged. Appellant was sentenced to 120 months' imprisonment. On appeal, Appellant argues the district court improperly permitted the Government to present similar-act evidence pursuant to Fed. R. Evid. 404(b).[1] We affirm.

I. BACKGROUND

We consider whether the district court properly admitted the Rule 404(b) evidence in the context of the extensive factual background of this case.

Following a cruise to St. Martin, Mercedes Quintana and

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*Honorable Jane A. Restani, Judge, U.S. Court of International Trade, sitting by designation.

[1]Appellant also claims there was insufficient evidence to support his convictions. We affirm this issue without discussion pursuant to 11th Cir. R. 36-1.

her husband were arrested by customs agents in the Port of Miami for attempting to enter the United States with bundles of heroin attached to their clothing. Quintana agreed to cooperate with law enforcement. She immediately implicated Olga Agudelo, who was to deliver the heroin from Miami to New York. Later, Quintana also implicated her brother-in-law, Adolfo Patino, the alleged drug dealer who arranged for the heroin to be delivered to Quintana in St. Martin.

Based on information provided by Quintana, Agudelo was indicted on federal drug charges in the Southern District of Florida. She retained Appellant Carbone, a criminal defense attorney practicing in New York and Miami. Appellant was given a $45,000 retainer, with an additional amount to be paid at a future date. Because Agudelo spoke no English and Appellant spoke no Spanish, Mejia acted as a translator. Before trial, Agudelo insisted she was innocent of the charges. Appellant accordingly developed a defense strategy that Agudelo was innocent and that Quintana had motives to implicate her in the heroin importation scheme.

Prior to Agudelo's trial, Libia Porras, Agudelo's half-sister, and Porras' niece, Sarah Veronica Caicedo, arrived in Miami. Porras and Caicedo stayed at the same hotel as Appellant and Mejia. On the Sunday before trial, Appellant and Mejia briefly met with Porras and Caicedo, at which time Porras agreed to testify on Agudelo's behalf; the substance of the proposed testimony was not discussed.

Quintana was the prosecution's principal witness at Agudelo's trial. Consistent with her prior statements to investigators, she testified Agudelo was Patino's principal courier in the United States. On cross-examination, Appellant pursued the defense that Agudelo was innocent and being framed by Quintana.

Appellant and Mejia met with Porras and Caicedo at their hotel to discuss defense strategy. According to the

Government's theory of the case, a story was fabricated for Porras' upcoming testimony. Appellant – nervous at this point for having taken a substantial fee from Agudelo, but having failed to fully prepare for the case and mount an adequate defense – created to following story. Porras was to testify that she and Agudelo had been in a motorcycle-parts partnership. Porras and Agudelo later sold the enterprise to Patino for $10,000 – $3,000 of which was paid in cash and $7,000 of which was represented in a promissory note from Patino to Agudelo. When Agudelo pressed Patino for payment on the note, Patino threatened to frame her for a narcotics offense.

According to Porras, she protested the proposed testimony because it was false. Believing in her sister's innocence, however, she reluctantly agreed to give the false testimony and rehearsed it for hours with Appellant. Thereafter, Appellant obtained written statements from Porras and Caicedo attesting that Porras' anticipated testimony was true and was not created by Appellant. Mejia signed a similar statement.

The following day, Porras gave her prepared testimony at Agudelo's trial. During a break, the prosecutor attempted to communicate with Porras to discuss her unexpected testimony. Appellant immediately interceded, however, advising Porras to decline any discussion. Apparently concerned about a formal prosecutorial inquiry regarding Porras' testimony, Appellant and Mejia allegedly advised Porras and Caicedo to leave the country immediately. Eventually, the jury found Agudelo guilty of the charges against her.

Thereafter, Porras re-entered the country and was charged by federal authorities with perjury. She admitted the charges, implicating Appellant and Mejia in the perjury and obstruction of justice scheme. Meanwhile, when the probation officer in Agudelo's case conducted his sentencing investigation, he discovered inconsistencies with Porras' trial testimony. At that time, Agudelo admitted Porras' trial testimony was false. The probation officer relayed this information to the presiding district

judge, who scheduled a hearing. Before the hearing, however, Appellant hastily met with Agudelo and allegedly offered to forgive the unpaid balance of his fee and to undertake her appeal *gratis* if Agudelo recanted her statement to the probation officer. Agudelo eventually agreed and signed a statement prepared by Appellant. At the court hearing, Agudelo recanted her statement to the probation officer and testified as set forth in the statement procured by Appellant. Without making factual findings, the district court removed Appellant from the case and appointed a public defender to further represent Agudelo.

Based on Porras' statements following her indictment, which were corroborated by Caicedo, Appellant was indicted on the current charges of obstructing justice and suborning perjury. Porras and Caicedo testified at Appellant's trial. Neither Appellant nor Mejia took the stand. Appellant's strategy at trial was to argue Agudelo and Porras had concocted the false testimony and duped Appellant into unwittingly eliciting the false testimony.

Pursuant to Fed. R. Evid. 404(b), and over defense objection, the district court permitted the Government to present evidence demonstrating Appellant previously induced the United States District Court for the Eastern District of New York into accepting real estate purportedly owned by Mejia as partial collateral for a client's $500,000 appearance bond in a criminal matter. In doing so, Appellant allegedly failed to disclose the title was clouded due to ongoing foreclosure proceedings against the property. Appellant also failed to disclose Mejia was Appellant's employee. After bail was posted, the client absconded.

Following trial which lasted over three weeks, the jury found Appellant and Mejia guilty as charged. This appeal followed.

II. STANDARD OF REVIEW

A district court's decision to admit similar-act evidence pursuant to Rule 404(b) should not be disturbed on appeal absent a clear showing of abuse of discretion. *See United States v. Calderon*, 127 F.3d 1314, 1331 (11th Cir. 1997); *United States v. Knowles*, 66 F.3d 1146, 1158 (11th Cir. 1995).

III. DISCUSSION

Rule 404(b) provides that evidence of conduct other than charged in the indictment is admissible only for purposes other than showing character.[2] *See United States v. Mills*, 138 F.3d 928, 935 (11th Cir. 1998). The three-part test prescribed by this Court for the introduction of Rule 404 (b) evidence is: (1) the prior act must be relevant to an issue other than character, (2) there must be sufficient proof about the act's occurrence, and (3) the act must have probative value that outweighs any prejudicial effect. *See United States v. Miller*, 959 F. 2d 1535, 1538 (11th Cir. 1992) (en banc); *see also Huddleston v. United States*, 108 S. Ct. 1496, 1499-502 (1988). We conclude the district court did not abuse its discretion in permitting the Rule 404(b) evidence.

A. Relevance

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[2]Rule 404(b) states:

> **Other Crimes, Wrongs, or Acts.** – Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. *It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident*, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Fed. R. Evid. 404(b) (emphasis added).

"Intent is always an issue when a defendant pleads not guilty to a conspiracy charge." *United States v. Butler*, 102 F.3d 1191, 1195 (11th Cir. 1997). As this Court noted in *United States v. Diaz-Lizaraza*, 981 F.2d 1216, 1224-25 (11th Cir. 1993):

> When a conspiracy defendant pleads not guilty, he or she "makes intent a material issue in the case and imposes a substantial burden on the government." Therefore, the government may introduce evidence of the defendant's extrinsic acts to prove intent if the defendant does not "affirmatively take the question of intent out of contention by stipulating . . . [to] the requisite intent."

Id. at 1224 (citations omitted). In this case, Appellant's *mens rea* was a central issue. There was no question the testimony presented by Porras at Agudelo's trial was false. The only question, then, was whether Appellant, in presenting her testimony, knew it was false and intentionally procured it. Accordingly, Appellant's state of mind was a crucial element of the Government's burden of proof, particularly in light of Appellant's defense at trial that he was unwittingly fooled into presenting the false story to the jury. Thus, "far from stipulating to the requisite intent, [Appellant's] . . . defense focused squarely on intent." *Id.* at 1225. Even if Appellant had not chosen to contest the issue of intent, the Rule 404(b) evidence would nevertheless have been admissible:

> A defendant's strategic decision not to focus the defense on the intent issue falls far short of a stipulation that the defendant possessed the requisite intent. Focusing the defense on an issue other than intent does not reduce the prosecution's burden to prove intent beyond a reasonable doubt. Likewise, it should not prohibit the prosecution from meeting that burden with otherwise admissible evidence.

Id. (citation omitted); *see also United States v. Hernandez*, 896 F.2d 513, 522 (11th Cir. 1990) (upholding admissibility of Rule 404(b) evidence relevant to intent even though defendants did not contest issue).

The Rule 404(b) evidence presented in this case was sufficiently similar in nature so as to be relevant to the charges against Appellant. Had Appellant been formally charged with a crime in regard to the bail-jumping matter, the charges would have likely involved elements of offenses similar, if not identical, to those at issue here. In light of this Court's precedent regarding the degree of similarity required to satisfy the relevancy prong of Rule 404(b), we discern no error in the district court's decision to admit the evidence. *See United States v. Butler*, 102 F.3d 1191, 1195-96 (11th Cir. 1997) (holding evidence of prior personal drug use relevant to prove intent in subsequent prosecution for drug distribution); *United States v. Maxwell*, 34 F.3d 1006 (11th Cir. 1994) (noting "'[e]vidence of prior drug dealings is highly probative of intent to distribute a controlled substance, as well as involvement in a conspiracy'") (quoting *United States v. Stubbs*, 944 F.2d 828, 836 (11th Cir. 1991); *United States v. Saldivar*, 710 F.2d 699, 704 (11th Cir. 1983) (holding prior transportation of illegal aliens was admissible to show defendants' knowledge of illicit status of individuals transported in charged offense).

B. Accuracy

Appellant contests the underlying facts of the Rule 404(b) evidence. He claims Mejia possessed valid legal title to the property at issue, which property had value. In doing so, Appellant questions the credibility of the Government's witnesses and the strength of the Government's case regarding the bond-jump episode. In essence, Appellant denies any impropriety with respect to this incident.

In considering the admissibility of the Rule 404(b) evidence in this case, the district court need not make credibility determinations or weigh the evidence presented by the parties. *See Huddleston*, 108 S. Ct. at 1051. The evidence presented by the Government need only "be sufficient to support a finding that the defendant actually committed the extrinsic act." *Diaz-Lizaraza*, 981 F.2d at 1224.

In this case, the attorney supervising the foreclosure of Mejia's property ("foreclosure attorney") testified at trial the foreclosure left Mejia devoid of valid legal title. The foreclosure attorney also opined no practicing attorney under those circumstances would have thought such title was effectively transferrable or the subject property had any value as collateral. Appellant himself evidenced his awareness of these matters by personally asking the foreclosure attorney about the possibility of saving the property from foreclosure. This and other evidence was sufficient for a reasonable jury to conclude Appellant knowingly and intentionally misrepresented the status and value of Mejia's purported interest in the property. Moreover, the Government offered sufficient evidence to prove Appellant failed to inform the trial court about Mejia's relationship with Appellant and the client. Accordingly, the district court did not abuse its discretion in determining there was sufficient evidence to support the existence of the Rule 404(b) extrinsic acts.

C. Benefit v. Prejudice

The last factor for measuring the propriety of admitting Rule 404(b) evidence "requires that the probative value of the extrinsic act evidence not be substantially outweighed by any unfair prejudice caused by that evidence." *Diaz-Lizaraza*, 981 F.2d at 1225; *see also* Fed. R. Evid. 403. As noted above, the prior act evidence in this case was relevant to proving Appellant's intent and knowledge in committing the acts charged in the indictment. "With regard to the government's need for this evidence, we note 'the special difficulty of proving intent in conspiracy cases.'" *Id.* (quoting *United States v. Pollock*, 926 F.2d 1044, 1048 (11th Cir. 1991)). Moreover, as Appellant argues, the Government's case was based significantly on the testimony of witnesses whose credibility was questionable. As with the trial in *Diaz-Lizaraza*, "there were no overwhelmingly credible witnesses to testify to [Appellant's] intent . . . ." 981 F.2d at 1225. Accordingly, the Rule 404(b) evidence was relevant and particularly useful in the Government's prosecution of the case.

Although the Rule 404(b) evidence concerned a prior bad act committed by Appellant, there were significant factors which mitigated any unfair prejudice to Appellant. For instance, our review of the record indicates the bail-jumping incident was not featured prominently at trial. The Government presented only two Rule 404(b) witnesses, the foreclosure attorney and the prosecutor in the bail proceeding. Both witnesses' testimony pertained to the same prior-act episode, the bail-jumping incident. Additionally, the witnesses were subject to cross examination.

In the end, the Rule 404(b) testimony constituted less than one afternoon of a three-week trial. In opening arguments, the prosecution mentioned the similar-fact evidence only in passing, admonishing the jurors to carefully consider the trial judge's instructions on the proper evaluation of such evidence. In closing argument, the prosecutor again only briefly discussed

the bail-jumping episode.[3] The Government limited the use of such evidence to the issue of intent, particularly in response to Appellant's repeated claim that he lacked the requisite state of mind to have committed the charged offenses. As in its opening statement, the Government again coupled its discussion of extrinsic evidence with a specific caution to the jury that it should follow the court's instructions regarding the proper evaluation of such evidence.

The district court instructed the jury regarding their use of the Rule 404(b) evidence on several occasions. Before each of the two Rule 404(b) witnesses testified, the district court gave the following limiting instructions:

> As I understand it, you are about to hear evidence of an act of one or more of the defendants which may be similar to those charged in the indictment but which was committed on another occasion.
>
> You must not consider any of this evidence in deciding if either defendant committed the acts charged in the indictment. However, you may consider this evidence for other very limited purposes.
>
> If you find beyond a reasonable doubt from other evidence in this case that the defendant did commit the acts charged in the indictment, then you may consider evidence of similar acts allegedly committed on other occasions to determine whether the defendant had the state of mind or intent necessary to commit the crime charged in the indictment.

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[3]Less than three out of approximately 90 pages of record text containing the Government's closing argument are devoted to the Rule 404(b) evidence.

This charge, which comports with our Circuit's pattern jury instructions,[4] was presented at the request of, and without objection from, Appellant. The district court further repeated the same instructions at the close of the case in its final charge to the jury. These instructions unequivocally cautioned the jurors against considering the prior act evidence for an improper purpose. This precaution is an effective tool in significantly reducing the risk of harm posed by Rule 404(b) extrinsic evidence. *See, e.g., Huddleston*, 108 S. Ct. at 1502; *Diaz-Lizaraza*, 981 F.2d at 1225 ("While the probative value and government need for this [404(b)] evidence were strong, any unfair prejudice possibly caused by its introduction was mitigated by the trial judge's limiting instructions."); *Hernandez*, 896 F.2d at 523 ("Finally, the district court limited the prejudicial effect of the extrinsic offense evidence by giving the jury cautionary instructions, when the evidence was introduced and again at the close of trial, on the limited use of such evidence.").

Although the Government requested the introduction of more than three additional prior bad acts, presenting witness testimony to proffer at least one of those extrinsic events, the trial court permitted only the introduction of the bail-jumping episode. In doing so, it is clear from the record the district court carefully considered the relevant factors in Rule 404(b), including the Government's need to prosecute its case and prove all elements of the charged offenses, and Appellant's interest in avoiding unfair prejudice. We are convinced the district court did not abuse its discretion in attempting to reach a proper balance between these competing considerations.

IV. CONCLUSION

For the foregoing reasons, we affirm Appellant's

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[4]*See Eleventh Circuit Pattern Jury Instructions, Criminal*, Special Instruction No. 4 (1997).

conviction.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 01-11055-EE

CORRECTED
Filed
U.S. Court of Appeals
Eleventh Circuit
Jul 18 2002
Thomas K. Kahn
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RUSSELL CARBONE,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC (Opinion _____, 11th Cir., 19___, _____F.2d_____).

Before: BLACK and RONEY, Circuit Judges, and RESTANI*, Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

ORD-42
(12/01)

* Honorable Jane A. Restani, Judge, U.S. Court of International Trade, sitting by designation.